LEE YEW SIONG v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Hamid J.) December 1, 1972]

[Kuala Lumpur — Selangor Criminal Appeal No. 121 of 1972]

Criminal Law and Procedure — Sentence — Appeal against sentence — Principles guiding appellate court — Deterrent sentence.

Penal Code s. 409 — Criminal breach of trust by solicitor — Sentence.

The appellant was convicted under section 409 of the Penal Code for committing criminal breach of trust in respect of a sum of $25,000 entrusted to him in his capacity as advocate and solicitor and was sentenced to three years imprisonment. He appealed against the sentence and his counsel submitted that the sentence imposed was manifestly excessive and certain material facts were not brought to the attention of the magistrate.

Held: public interest demands that a deterrent sentence be passed on any person who commits an offence of the nature as in this case but it is equally true that each case should be dealt with according to its individual merits. In this case, the sentence imposed was manifestly excessive having regard to the facts and circumstances, and a short sentence of imprisonment and a fine would be adequate.

Cases referred to:-

(1) *R.* v. *De Cruz* [1935] M.L.J. 1.

(2) *Abu Bakar* v. *R.* [1953] M.L.J. 19.

(3) *Public Prosecutor* v. *Fam Kim Hock* [1957] M.L.J. 20.

(4) *Abdul Rahman* v. *Public Prosecutor* [1950] M.L.J. 219, C.A.

(5) *Deputy Public Prosecutor* v. *Isaac Elion* [1949] M.L.J. 160.

MAGISTRATE'S APPEAL.

Khoo Eng Chin for the appellant.

Gunn Chit Tuan for the public prosecutor/respondent.

Abdul Hamid J. (delivering oral judgment): The appellant was convicted under section 409 of the Penal Code for committing criminal breach of trust in respect of a sum of $25,000 entrusted to him in his capacity as advocate and solicitor by the magistrate Kuala Lumpur, on July 28, 1972 and was sentenced to three years of imprisonment.

The appeal is against the extent of the sentence. Mr. Khoo Eng Chin counsel for the appellant has intimated to me that he is abandoning the appeal against the legality of the sentence.

Mr. Khoo Eng Chin submitted that the sentence imposed was manifestly excessive and certain material facts were not brought to the attention of the magistrate.

It was also submitted that the appellant had practised as advocate and solicitor for 15 years before the conviction and consequent upon the conviction, disciplinary action was taken and proceedings are now at a stage where notice to show cause has already been issued to the appellant.

Mr. Khoo referred to two factors that were taken into account by the magistrate; (a) that the complainant stands to lose $25,000. It is submitted that civil remedy is available to the complainant for the refund. (b) that the appellant was an advocate and solicitor and had misused his position. Mr. Khoo submitted that disciplinary action has been taken against him under the Advocates and Solicitors Ordinance.

Mr. Khoo further submitted that the appellant has already served imprisonment for one month and two days and in the circumstances no purpose would be served by putting him away in prison.

Mr. Gunn Chit Tuan for the Public Prosecutor on the other hand, submitted that sentence should be commensurate with the facts of the case and it is for the court to consider the appropriate sentence.

Before I proceed any further, let me refer to some of the principles of law which guide the appellate court in regard to appeals against sentence.

It is an established principle of law that the court will not interfere with the decision of the court below on the question of sentence unless the trial court has proceeded on wrong principle or given undue weight to some of the evidence. (See *R.* v. *De Cruz*[1]).

Further, "An appellate court should not alter a sentence because the members of the court might have passed a different sentence. (*Abu Bakar* v. *R.*[2])." "The sentence of the court of first instance should not be altered unless it is manifestly wrong, wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. (*Public Prosecutor* v. *Fam Kim Hock*[3]."

However, "in suitable cases, the Court of Appeal will reduce or enhance sentences when, having before them all the material which the trial judge had before him, they consider, having regard to all the circumstances of the case, that the sentence imposed was manifestly excessive or inadequate. (*Abdul Rahman* v. *Public Prosecutor*[4])."

(See also *Deputy Public Prosecutor* v. *Isaac Elion*[5]).

In the light of these authorities, it is therefore necessary to consider all the facts and circumstances of the case and say whether the sentence imposed was manifestly excessive.

The appellant was an advocate and solicitor at the time he was convicted of the offence. I do not for a moment suggest that this serious offence for which he was convicted should be viewed less seriously just because he was an advocate and solicitor. However, the court cannot ignore the fact that he will face disciplinary proceedings and the high probability that he will be struck off the roll of advocates and solicitors.

As for the loss suffered by the complainant, he is at liberty to institute civil proceedings to recover the sum in respect of which the appellant dishonestly misappropriated.

The magistrate also observed that the appellant knew the consequences of his misappropriating someone else's money. That is true. The appellant himself had admitted his foolishness, nonetheless the court should also consider other penalties he has to suffer consequent upon his conviction. The stigma of the conviction for an offence such as this and of being

struck off the roll will have to be borne by him for the rest of his life.

In his plea of mitigation in the lower court the appellant prayed for the mercy of the court saying — "I lost everything. I have let down my profession, family and friends."

It is true the public interest demands that a deterrent sentence be passed on any person who commits an offence of this nature but it is equally true that each case should be dealt with according to its individual merits. To illustrate my point, I quote the following passage —

"... The first and foremost consideration of punishment is the public interest. The object of punishing crime is not only to punish the offender but also to deter others. Public interest is best served if the offender is induced to turn from criminal ways to honest living. Our law does not therefore fix the sentence for a particular crime but fixes a maximum sentence and leaves it to the court to decide what is the appropriate sentence in the particular circumstances of each case. It is for these reasons that evidence of antecedents and character should be taken before sentence in respect of each convicted person. [*Abu Bakar* v. *R. (supra)*]."

It is my considered opinion that the sentence imposed is manifestly excessive having regard to the facts and circumstances of this particular case. A short sentence of imprisonment and a fine would be adequate.

I would therefore allow the appeal and substitute two months imprisonment instead. In addition I impose a fine of $2,000 in default one year imprisonment.

Appeal allowed.

Solicitors: *Khoo & Sidhu.*